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No. 79-1952

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

CALIFORNIA MEDICAL ASSOCIATION, et al.,
Appellants,

vs.

FEDERAL ELECTION COMMISSION, et al.,
Appellees.

On Appeal From the United States Court of Appeals For the Ninth Circuit En Banc

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

ARGUMENT

I

APPELLEES HAVE FAILED TO SHOW THAT THIS CASE WAS IMPROPERLY CERTIFIED UNDER 2 U.S.C. SECTION 437h(a) OR THAT THIS COURT LACKS JURISDICTION UNDER SECTION 437h(b)

Section 437h is a unique judicial review provision, *Clark v. Valeo,* 559 F.2d 642, 645 (D.C. Cir. 1977) (en banc), *aff'd sub nom. Clark v. Kimmitt,* 431 U.S. 950 (1977), enacted for the purpose of allowing prompt judiciai review of con-

stitutional challenges to the Act, and specifically to provide for ". . . comprehensive review, speedy review and ultimate review . . ." by the Supreme Court, *Bread Political Action Committee v. Federal Election Commission,* 591 F.2d 29, 33 (7th Cir. 1979). The Commission argues that this provision must be narrowly construed, that the district court erred in certifying this case to the court of appeals and that this appeal was improperly taken. The Commission's arguments would abrogate meaningful jurisdiction under § 437h.

A. Jurisdiction Under Section 437h Is Not Limited to Questions Pending During the Congressional Debate on the 1974 Amendments

The Commission seems to argue that jurisdiction under § 437h is limited to consideration of constitutional questions regarding the Federal Election Campaign Act Amendments of 1974.[1] The plain language of the statute, which states in pertinent part that "[t]he district court immediately shall certify all questions of constitutionality of this Act . . ." is obviously inconsistent with the Commission's interpretation. As discussed in *Bread PAC v. FEC,* 591 F.2d at 30-34, § 437h(a) requires the district court to "certify *all* questions of constitutionality of this Act . . ." (emphasis added) to the court of appeals sitting en banc. This language demonstrates Congress' intent that questions in addition to the specific issues which the 93rd Congress may have considered be certified. The direction to certify all constitutional questions shows that Congress intended the unique review procedures to apply broadly to challenges to the Act. *Id.* at 31.

In addition to the decision below by the district court, constitutional questions have been certified under § 437h in several instances despite the lack of any articulated con-

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[1]P.L. No. 93-443, 88 Stat. 1263 (1974).

nection with the Congressional debate of the Federal Election Campaign Act Amendments of 1974.[2] These authorities furnish a broad spectrum of judicial opinion for the proposition that § 437h extends beyond questions specifically considered during deliberation of the 1974 Amendments.

Section 437h was amended by both the 1976 Amendments and the 1979 Amendments.[3] In both instances the amendments were non-substantive. In the absence of a "sunset provision," or specific words of limitation in the statute, Congress' failure to curtail jurisdiction under § 437h in subsequent amendments further demonstrates that jurisdiction under this section is broader than that envisioned by the Commission and is not limited by the concerns expressed by Senator Buckley or others during debate on the 1974 Amendments.

B. The Exercise of Jurisdiction Under Section 437h Does Not Disrupt Enforcement Proceedings

The Commission argues that no jurisdiction can exist under § 437h since the parties to this action are also respondents in an enforcement proceeding. This interpretation of the Act would foreclose jurisdiction under § 437h whenever the process specified in 2 U.S.C. § 437g has commenced.

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[2] *E.g., Clark v. Valeo*, 559 F.2d 642 (D.C. Cir. 1977) (en banc), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977) (dismissed on ripeness grounds); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980) (questions certified *sua sponte* after they had been raised as a defense); *Republican Nat. Committee v. Federal Election Commission*, 616 F.2d 1 (2d Cir. 1980), *aff'd*, 100 S.Ct. 1639 (1980); *Federal Election Commission v. Lance*, 617 F.2d 325 (5th Cir. 1980) (constitutional questions certified *sua sponte* by three-judge panel of court of appeals on appeal from subpoena enforcement proceeding).

[3] P.L. 94-283, 90 Stat. 496; P.L. 96-187, 93 Stat. 1366.

Nothing in the language of the Act compels this result. This interpretation allows the unique judicial review provisions of § 437h be cut off in midstream, or be made unavailable to parties most likely to avail themselves of these provisions. The right of prompt, comprehensive review provided by § 437h should not be contingent on the FEC's decision to commence an enforcement proceeding.

The Commission argues an absence of any legislative history to show that a respondent in an enforcement proceeding under § 437g should be entitled to the unique judicial review provision set forth in § 437h. This ignores the clear language of both § 437h and § 437g. Statutory interpretation begins with the language of the statute. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 197, 201 (1976). Although discussing the distinction between enforcement and vindication of constitutional rights in a declaratory relief action, the Commission fails to acknowledge the significance of this distinction. By creating a special judicial review provision for constitutional questions, Congress showed the need for comprehensive review, speedy review and ultimate review by this Court of all constitutional questions involving the Act. *Bread PAC v. FEC,* 519 F.2d at 33.[4] By glossing over the distinction between an

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[4]*See Common Cause v. Schmitt,* No. C80-1609, *Federal Election Commission v. Americans For Change,* No. C80-1754 (D.D.C. September 30, 1980) (consolidated opinion) (three-judge court), Brief of Appellants at A-18, where the court interpreted the Presidential Campaign Fund Act, 26 U.S.C. § 9001, *et seq.* The Court found that § 9011(b)(2), a provision analogous to § 437h, required expeditious judicial review of questions involving the implementation or construction of the Fund Act ". . . because elections come up fast and candidates, whoever they turn out to be, and others, need to know what and how the elections laws apply, and how much they provide (footnote omitted). So that elections run smoothly, Congress has provided only that three-judge courts (with direct appeal to the Supreme Court) shall: quickly construe doubt-

enforcement proceeding and an action involving the constitutionality of the Act, the Commission ignores the obvious distinction between a proceeding whose import may be limited to the parties directly involved and the constitutionality of the provisions of the Act which may have wide-ranging impact. *See California Medical Ass'n v. Federal Election Commission,* No. 79-4426 (9th Cir. May 23, 1980). J.S. at A-41, CCH at 51,001 (Wallace, J. concurring and dissenting).

The Commission does not show how the present action has in any way impeded the progress of the enforcement action entitled *Federal Election Commission v. California Medical Ass'n,* No. C-79-1197-WHO (N.D. Cal., judgment entered December 10, 1980). The Commission argues, Brief for Appellees at 13-14, that the exercise of jurisdiction under § 437h in the present matter allows appellants to circumvent the procedures for judicial review established by § 437g. It is unclear precisely how this has or will occur. The enforcement action was originally filed May 22, 1979, and proceeded to trial as originally scheduled by the district court on March 17-18, 1980. A decision was rendered in an opinion filed October 21, 1980. Brief of Appellants at A-1. Judgment has now been entered on that opinion. While implying that the filing of an action under § 437h was somehow an invidious attempt to avoid enforcement, nowhere does the Commission demonstrate that the enforcement action was in any way inhibited.

The Commission incorrectly argues that the judicial system was burdened with two separate actions involving the same parties. This ignores the fact that appellants Foster and Rose were not parties to the enforcement proceeding. As plaintiffs specifically enumerated in the first

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ful (or, dubious) sections of the Fund Act, and/or quickly implement the Act's funding mechanism for the benefit of entitled candidates." Brief of Appellants at A-45.

sentence of § 437h(a) they have a separate statutory grant of standing to sue. *CMA v. FEC,* J.S. at A-45, CCH at 51,003 (Wallace, J. concurring and dissenting). The Commission also wrongfully argues that because appellants filed an action under § 437h they have "successfully avoided" review of affirmative defenses raised in the enforcement proceeding. It is self-evident these defenses were not raised by appellants in the enforcement proceeding so that their disposition could be avoided, although the district court properly refused to address these defenses given the prior dispositive ruling by the Ninth Circuit. See, *FEC v. CMA,* Brief of Appellants at A-5. Because of the prior ruling by the Ninth Circuit, the district court was relieved of the task of rendering an opinion on constitutional questions raised in the present matter which were also alleged as affirmative defenses in the enforcement proceeding.

It is ironic that the Commission now complains about the favorable ruling on the merits in the Ninth Circuit which, if sustained by this Court, would dispose of the affirmative constitutional defenses raised by CMA and CALPAC in the enforcement proceeding. Authoritative disposition of these questions would benefit all parties. Like an interlocutory appeal under 28 U.S.C. § 1292(b), the resolution of important issues will result in certain judicial economies to the parties. The Commission's criticism that it is constrained by the administrative procedures set forth in § 437g which are required before an enforcement action may be filed is also plainly wrong. The first sentence of § 437h(a) specifically states that the Commission may avail itself of § 437h and institute declaratory relief actions to construe the constitutionality of the Act. Clearly, if a particular provision requires authoritative adjudication the FEC has a statutory grant of standing to file the appropriate action under § 437h.

It is not appellants' construction of § 437h which is contrary to traditional principles of constitutional adjudication. Instead, Congress has made a determination that speedy, comprehensive and authoritative disposition should be made of constitutional questions regarding provisions of the Act. *E.g., Bread PAC,* 591 F.2d at 33. The federal courts have demonstrated their ability to limit actions brought under § 437h so as to avoid giving advisory opinions. *E.g., Clark v. Valeo,* 559 F.2d at 646-650; *Mott v. Federal Election Commission,* 494 F.Supp. 131 (D.D.C. 1980), *appeal docketed* No. 80-1949 (D.C. Cir. August 12, 1980); *Gifford v. Congress,* 452 F.Supp. 802 (E.D. Cal. 1978).

The Commission also argues that§ 437h should not be expanded to encompass affirmative defenses in an enforcement action. This issue is not before the Court as this matter comes to the Court in a proceeding originally brought under § 437h as opposed to an affirmative defense in an enforcement proceeding certified pursuant to § 437h. The Commission complains that the district court's decision in *FEC v. CMA* will cause the Ninth Circuit to be confronted with the same controversy although limited to non-constitutional issues.[5] It is presumptuous for the Commission to conclude at this time that the district court decision in *FEC v. CMA* does not involve other constitutional questions, or that non-constitutional issues which might be raised on appeal would not be appropriate for appellate review. It makes no sense to argue that merely because the Ninth Circuit has answered certain constitutional questions it would therefore be inappropriate to address other issues arising out of the separate enforcement proceedings. The argument that the duplication of

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[5]CMA and CALPAC filed a notice of appeal in *FEC v. CMA* on December 18, 1980.

judicial efforts could be avoided if jurisdiction was not exercised under § 437h is plainly wrong, since at some point both the district court, and possibly the court of appeals, would be required to deal with issues outside the scope of § 437h in the enforcement proceeding.

C. None of the Authorities Cited by the Commission Require the Narrow Construction of Section 437h Urged by the Commission

The Commission cites several cases, none of which are apposite, for the proposition that § 437h should be narrowly construed in this instance. This is not a criminal action like *United States v. Clifford*, 409 F.Supp. 1070 (E.D.N.Y. 1976). The fact that the parties in *Federal Election Commission v. National Right to Work Committee*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9122 (D.D.C. 1980), *appeal docketed* Nos. 80-1487, 80-1488 (D.C. Cir. May 7, 1980) failed to move to certify constitutional questions is not controlling here. The Commission can hardly now complain that *CMA v. FEC* and *FEC v. CMA* were not consolidated, having itself neglected to make a motion to consolidate in either proceeding. The inference that the preparation of a comprehensive record would have assisted the court of appeals in disposing of the present matter is insufficient to defeat jurisdiction. Had the Ninth Circuit felt that additional facts were necessary before it could render a decision, it could have remanded for fact-finding. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 9-10 (1976); *Republican Nat. Committee v. Federal Election Commission*, 616 F.2d 1 (2d Cir. 1980), *aff'd*, 100 S.Ct. 1639 (1980).

Clearly, CMA and CALPAC are parties with the requisite personal stake to meet the standing requirements of article III. Appellants Foster and Rose fall within the statutory grant of standing contained in § 437h(a), and have the requisite interest as members of CMA and CAL-

PAC to meet the requirements of article III. *CMA v. FEC*, J.S. at A-45, CCH at 51,003 (Wallace, J. concurring and dissenting). Limitations on standing to proceed under § 437h advanced by *Martin Tractor Co. v. Federal Election Commission*, 460 F.Supp. 107 (D.D.C. 1978), *aff'd* 627 F.2d 375 (D.C. Cir. 1980), *cert. denied sub nom. National Chamber Alliance for Politics v. Federal Election Commission*, ... U.S. ....., 49 U.S.L.W. 3332 (1980) are contrary to *Buckley v. Valeo*, 424 U.S. at 11-12, and two rulings by the Seventh Circuit in *Bread PAC v. FEC*, 591 F.2d at 31 and *Bread Political Action Commission v. Federal Election Commission*, No. 80-1146 (December 5, 1980) (en banc), slip op. at 6-8, *citing CMA v. FEC*. Furthermore, it should be obvious that the present matter presents a controversy ripe for adjudication, particularly in light of the enforcement action subsequently filed by the Commission.[6]

In summary, the district court properly certified this case to the Ninth Circuit pursuant to § 437h(a). The Ninth Circuit had jurisdiction to render its decision and this appeal is properly before this Court pursuant to § 437h(b). This Court should exercise jurisdiction.

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[6]The arguments by Common Cause that plaintiffs in an action brought under § 437h must also show irreparable harm and the inadequacy of legal remedies is inconsistent with the implied findings by the majority below and Judge Wallace's discussion of prudential considerations. Relying on the statement by this Court in *Buckley* that jurisdiction exists to the extent permitted by article III, Judge Wallace concluded that prudential considerations do not apply. *CMA v. FEC*, J.S. at A-44, CCH at 51,002.

The argument that an enforcement proceeding may obviate the need for bringing an action under § 437h ignores the fact that the parties which may invoke § 437h will not know until after that proceeding is concluded whether the more comprehensive review available under § 437h should have been sought. This approach also ignores the res judicata effect of a ruling under § 437g and the resultant foreclosure of meaningful review under § 437h.

II

APPELLEES HAVE FAILED TO SHOW THAT THE LIMIT ON SUPPORT FOR A POLITICAL COMMITTEE ESTABLISHED BY SECTION 441a(a)(1)(C) IS CONSISTENT WITH THE FIRST AMENDMENT OR THE FIFTH AMENDMENT

In arguing that the $5,000 limit established by § 441a(a)(1)(C) is valid, the Commission emphasizes statements made by the majority below regarding the supposed abuses which would occur if unlimited amounts of cash could be contributed to a political committee. While appellants agree with the analysis by Judge Wallace in his concurring and dissenting opinion that would invalidate § 441a(a)(1)(C) entirely, J.S. at A-52-A-72, CCH at 51,005-51,012, it is important to repeat that this challenge was not brought for the purpose of allowing unlimited cash support for a political committee, but instead is directed at relieving unincorporated associations and their political committees from the $5,000 limit on administrative support. Accordingly, the discussion which follows will focus on the relevant arguments as they concern administrative support.

A. The $5,000 Limit on Contributions of Administrative Support by an Unincorporated Association to Its Political Committees Violates the First Amendment

In analyzing the *Buckley* decision, Judge Wallace found that a limitation on contributions to political committees can only be sustained if the governmental interest outweighs the impact on group and individual speech and associational freedoms, and a restriction of support by unincorporated associations, but not corporations or labor organizations, is "closely tailored" to achieve the government's purposes. *CMA v. FEC*, J.S. at A-62, CCH at 51,009. Limits on support for a political campaign were comparable to limits on individual speech affected by the

expenditure limits invalidated in *Buckley*. *Id.* Judge Wallace also found that the impact upon associational freedoms was even more substantial and inhibited the ability of associations to amplify the views of their members. *Id.* at A-64 - A-65, CCH at 51,009-51,010. Then, after reviewing the conference report relied on by the majority and appellees[7] Judge Wallace found that the stated purpose of preventing the funneling of contributions through political action committees was reached elsewhere by the Act, in § 441a(a)(7)(B)(i) and § 441a(a)(8). *Id.* at A-66, CCH at 51,010.

Judge Wallace continued by noting that the majority speculated Congress enacted § 441a(a)(1)(C) ". . . to curb the generalized corruptive threat posed by committees." *Id.* at A-67, CCH at 51,010. Judge Wallace went on to point out that this was pure speculation, without any support in the legislative history. *Id.* at A-68, CCH at 51,011. Citing *e.g., Johnson v. Robison,* 415 U.S. 361, 376-377 (1974), Judge Wallace found that when performing strict scrutiny ". . . a court does *not hypothesize* conceivably governmental purposes in support of challenged legislation." *Id.* at A-68, CCH at 51,011. Even if this purpose was validly considered, Judge Wallace noted that the $5,000 limit on contributions to candidates contained in § 441a(a)(2)(A) prevented the *quid pro quo* arrangements with candidates and that the $5,000 limit on support for a political committee contained in § 441a(a)(1)(C) regulated in entirely different relationship. Thus, Judge Wallace concluded that no significant anti-corruptive objective supported the ". . . substantial infringement on speech and associational rights . . . imposed by the $5,000 limit." *Id.* at A-69, CCH at 51,011.

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[7]H.R. Rep. No. 1057, 94th Cong., 2d Sess. 56-57 (1976).

The Commission does not address these arguments directly but does argue that the $5,000 limit is simply part of a well-balanced, regulatory scheme and prevents corruption. Brief for Appellees at 26-27. It is then argued that since donations to a political committee fall within the statutory definition of contributions and are in some ways consistent with the *Buckley* analysis that such support for a political committee can be limited to $5,000 per year. This argument overlooks the difference in the very nature of contributions to a candidate as compared with contributions to political committees. The latter may merely be for the purpose of sustaining the political committee, such as in the case of the administrative support necessary to establish, administer, and solicit contributions to a political committee. While contributions in the form of cash or certain in-kind contributions may be in turn contributed to candidates, this type of support may also be used to fund independent expenditures. *CMA v. FEC*, J.S. at A-63, CCH at 51,009 (Wallace, J. concurring and dissenting); *see Buckley v. Valeo*, 424 U.S. at 243 (Burger, C.J., concurring and dissenting). Thus, with a more searching analysis, it becomes apparent that support for a political committee serves functions other than funding candidate contributions. Simply arguing that support for a political committee mechanically falls within the statutory definition of contributions is insufficient to extend the rationale justifying the limits on candidate contributions to limits on support for a political committee. The fact that CMA and CALPAC have not during the years in question made independent expenditures to federal candidates is simply not relevant, given the facial analysis applied by the Court below and urged by the Commission in its brief.

The Commission incorrectly characterizes support for a political committee which makes independent expenditures as merely a symbolic expression of support. Brief for

Appellees at 29-30. This interpretation of the activities of political committees ignores the nature and function of political committees under the Act.[8] As noted in *Common Cause v. Schmitt:*

> This phenomenon of the so-called political committees *is* the right of association to express political views together with others, and thereby impress the public. (emphasis in original.)

Brief of Appellant at A-42.

The right to *effective* association, *e.g., Buckley v. Valeo,* 424 U.S. at 15, is inhibited when administrative support for a political committee can be limited in the same fashion as contributions to a candidate. The rationale justifying a limit on direct contributions and the avoidance of a *quid pro quo* relationship which justified limits on contributions, *Buckley v. Valeo,* 424 U.S. at 26, cannot be so easily extended to the relationship of donor and political committee. This is particularly so when the donor only furnishes administrative support.

The distinction between the relationship of donor-political committee and the contributor-candidate nexus demonstrates that the arguments found sufficient in *Buckley* to sustain the $1,000 limit on individual contributions to candidates, or the $25,000 annual limitation on an individual aggregate contributions are not authority to

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[8]The increasingly significant role played by political action committees in federal campaigns since enactment of the 1974 Amendments is discussed from several perspectives in Symposium, *Political Action Committees and Campaign Finance,* 22 Arizona Law Review, 351-674 (1980). See specific articles cited in Brief of Appellants at 25, n.22; Institute of Politics, John F. Kennedy School of Government, Harvard University, *An Analysis of the Impact of the Federal Election Campaign Act 1972-78,* prepared for the House Comm. on House Admin., 96th Cong. 1st Sess. (Comm. print 1979), cited in Brief of Appellants at 27, n.26.

sustain a limit on support for political committees. The latter is simply not a corollary of the former limitations. The situations where a *quid pro quo* relationship might develop although the donor does not make a contribution directly to a candidate are already regulated by the anti-evasion provisions of §§ 441a(a) (7) and (8). Thus, contributions to a candidate's authorized political commitee; expenditures made in cooperation, consultation or concert with a candidate or his committee; the distribution or republication of campaign materials prepared by a candidate; or earmarked contributions made through an intermediary are all considered as "contributions" for purposes of the Act. In these instances, the donor's actions result in a substantial relationship between the donor and the ultimate beneficiary, a candidate. If a situation described in §§ 441a (a) (7) and (8) is identified, it is appropriate under the rationale sustaining limits on contributions that the transaction be considered a "contribution." The Commission's analysis fails to examine the narrow scope of these anti-evasion provisions, and simply concludes that the broader, all-encompassing $5,000 calendar-year limit established in § 441a(a) (1) (C) is justified by this same rationale. Even assuming a need for additional anti-evasion provisions to supplement the provisions outlined above, the blanket limitation on support for a political committee regulates too broadly, and fails the less drastic means test, *Lamont v. Postmaster General,* 381 U.S. 301, 310 (1965) (Brennan, J., concurring). See Brief of Appellants at 32-40 and Judge Wallace's concurring and dissenting opinion below, J.S. at A-70-A-71, CCH at 51,011. Particularly when analysis is limited to administrative support solely for the purpose of establishing, administering, or soliciting contributions to an unincorporated association's political com-

mittee, the rationale offered to justify the $5,000 limit is insufficient.[9]

The discussion which appears in the Brief for Appellees at 34 to the effect that there are other outlets for political activity by CMA, CALPAC, and their members is largely irrelevant. All of the comments which apply to CMA apply to all other persons, with the exception of corporations and labor organizations. It proves little to state that CMA may contribute $1,000 per election to as many candidates as it chooses, and may contribute $5,000 per year to CALPAC and to other political committees, and may furthermore contribute $20,000 per year to a national party committee. All persons except corporations and labor organizations may make similar unlimited independent expenditures. It proves nothing to state that CALPAC may contribute $5,000 to as many candidates as it chooses per election, $5,000 per year to as many political committees as it chooses and $15,000 per year to national party committees. The same rules apply to all multi-candidate political committees. The Commission goes on to state its concern

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[9]The arguments made by the Commission, Brief for Appellees at 32, that elimination of the $5,000 limit on contributions to a political committee would allow large sums to be channeled to political committees likely to contribute to a particular candidate is, of course, totally inconsistent with the record in this case or the Court's findings of fact in *FEC v. CMA*, Brief of Appellants at A-1. Nowhere is there any evidence to support the notion that CMA makes cash contributions to CALPAC, or makes contributions to CALPAC or any other entity except for administrative support for CALPAC. In any event, as inferred elsewhere in the Commisssion's brief, there would be no incentive for CMA to channel contributions when it could legally make direct contributions itself although such contributions would otherwise be subject to the limits established in § 441a(a).

that members of CMA and CALPAC may individually contribute $1,000 per election to candidates, $5,000 to political committees and $20,000 to national party committees. Again, the same rules apply to all individuals. The executive and administrative personnel of a corporation or the members of a union may all make the same direct contributions. Furthermore, it is not individual political action which is directly at issue here but rather the ability of individuals to associate for effective political action. The Commission's recitation of these provisions confusions the real issues here, which concern CMA's administrative support of CALPAC.

The notion suggested at Brief for Appellees at 35 that individual members of CALPAC can contribute to CALPAC to cover its administrative expenses obscures one purpose of a political action committee. As pointed out in *Common Cause v. Schmitt,* Brief of Appellants at A-33, political committees are "pooling agents." The purpose of these committees is to amplify the voice of their adherents. *CMA v. FEC,* J.S. at A-64, CCH at 51,009 (Wallace, J., concurring and dissenting). Every dollar contributed by a member of CALPAC which goes to administrative costs reduces the ability of CALPAC to participate in the political process. The benefit of receiving administrative support from a sponsoring organization such as CMA helps to make political committees an attractive donee. Contributors would be reluctant to contribute funds for political purposes when a portion of those funds would be used for administrative costs rather than direct political activity. The Commission's arguments ignore the role of political committees as an efficient way to solicit funds and to participate effectively in the political process.

B. Appellees Have Not Demonstrated That the Regulatory Scheme Which Permits Corporations and Labor Organizations to Receive Unlimited Support From Their Political Committees Does not Discriminate Against Unincorporated Associations in Violation of the Fifth Amendment

As pointed out in the Harvard study and the articles contained in the symposium recently published by the Arizona Law Review,[10] participation by political action committees in the process of electing federal candidates continues to increase. Meanwhile, the role of individual contributions and party contributions as a percentage of the total contributions to federal candidates is decreasing. In this milieu it is important that those interest groups design to participate in the political process be permitted to do so in a manner equivalent to other interest groups. Citing the prohibition on direct contributions by corporations or labor organizations, the Commission infers that these entities are precluded from participating in the political process as effectively as an unincorporated association and its political committee. In reality, the proscription of direct contributions merely limits funds available for contributions by the separate segregated funds established by corporations or labor organizations to those funds which are received from voluntary contributions. The Commission argues that there is no limit on direct contributions by an unincorporated association. However, as this Court suggested in *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 794, n.34 (1978), it is likely that an unincorporated association will be unable to make significant contributions from treasury funds not specifically contributed for political purposes. The use by an unincorporated association, particularly where membership is voluntary and

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[10]See n.8, *supra*; Brief of Appellants at 25, n.22, and 27, n.26.

not directly linked to employment, of its members' dues for political purposes is likely to result in a loss of membership, with those members withdrawing who do not concur in the political goals of the organization.[11] The use of compulsory dues for political contributions by an unincorporated association would violate the first amendment. *Abood v. Detroit Board of Education,* 431 U.S. 209, 234-235 (1977). Thus it is unlikely that an association will be able to use funds, other than voluntary contributions, for candidate support.

A vital practical question is whether a political committee, be it freestanding or supported by a corporation, labor organization or unincorporated association, can solicit sufficient contributions to be effective. Corporations and labor organizations, and their separate segregated funds, have the advantage in conducting solicitations of unlimited administrative support by the corporation or labor organization. On the other hand, an unincorporated association is limited to $5,000 in annual support and must cover all of its remaining overhead from the voluntary contributions it receives. This limits the ability to solicit and reduces proportionately the political committee's ability to make contributions or independent expenditures, or otherwise participate in the political process. Appellants submit that it is insufficient to merely examine the limits on contributions in assessing the relative position of entities regulated by the Act.

The Commission also argues that greater limits are placed on the solicitation activities of corporations and labor organizations as compared to an unincorporated asso-

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[11]During the period under scrutiny in *FEC v. CMA*, of 25,000 CMA physician members only 7,000-10,000 physicians or their families contributed to CALPAC. Brief of Appellants at A-2. Thus, during this time the majority of CMA members did not contribute to CALPAC.

ciation. While true, as a practical matter it seems self-evident that both corporations and labor organizations have sufficient opportunity to solicit those most likely to contribute; i.e., corporate executive or administrative personnel and their families, or the members of labor organizations and their families. To presume that a membership organization will have substantial success soliciting contributions from nonmembers or individuals not otherwise closely related to the affinity group ignores the proliferation of political action committees.[12] In the final analysis, the Commission argues that unincorporated associations and their political committees are not deprived of equal protection of the law because they are subject to different rules than those which apply to corporations or labor organizations. The argument infers that corporations and labor organizations are subject to more stringent restrictions. The Commission does not, however, mention any example of an unincorporated association which makes substantial contributions to candidates or an unincorporated association which in conjunction with a political committee participates vigorously in the political process by making direct contributions to candidates. From a practical perspective, the key element is not the limit on direct contributions by corporations or labor organizations, or the differing solicitation rules which apply, but instead the total impact of the regulatory scheme which, in this instance, results in political committees supported by unincorporated associations being treated less favorably than committees supported by corporations or labor organizations. Given

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[12]The Commission's Committee/Sponsor Index lists more than 1,000 "non-party related" political action committees ranging from the A&P Better Government Committee (Great Atlantic & Pacific Tea Co. Inc.) to the Zapata Political Action Committee (Zapata Corporation), representing a wide range of interest groups. FEC, *Committee/Sponsor Index*, June 5, 1980.

the strict scrutiny required under the analysis presented in *Buckley v. Valeo,* Judge Wallace was correct in concluding that § 441a(a)(1)(C) when read in conjunction with § 441b (b)(2)(C) is not carefully tailored to achieve the government's legitimate purposes. *CMA v. FEC,* J.S. at A-70-A-72, CCH at 51,011-51,012. As Judge Wallace points out, there is nothing to show that corporations and labor organizations are less likely to use administrative support to circumvent the valid provisions of Act. *Id.* For these reasons the statutory scheme fails to accord appellants equal protection of the laws in violation of the fifth amendment.

CONCLUSION

The Court should exercise jurisdiction under § 437h and answer all of the certified questions in the affirmative. In the alternative, the Court should treat the Jurisdictional Statement as a petition for certiorari, reverse the decision by the majority below and invalidate the $5,000 limit on administrative support by an unincorporated association for its political committee.

Respectfully submitted,

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